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No. 02-1774

In The
Supreme Court of the United States

In re FRED RIGGS, DONNA SINGER, and AL DICKSON,

Petitioners.

On Petition For Writs Of Mandamus And Prohibition To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF MANDAMUS AND PROHIBITION OF RESPONDENTS SAN JUAN HEALTH SERVICES DISTRICT, ROGER ATCITTY, KAREN ADAMS, PATSY SHUMWAY, JOHN LEWIS, REID WOOD AND LAUREN SCHAFER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an extraordinary writ of mandamus should issue to compel the court of appeals (i) to correct alleged errors in its decision in this matter and (ii) to enforce immediately certain Navajo tribal court orders against respondents, despite this Court's previous denial of petitioners' writ of certiorari raising the same errors and issues.

2. Whether an extraordinary writ should issue to prohibit the Health District and the Health District employees and board members sued either individually or in their official capacity from being represented by one law firm.

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners Fred Riggs, Donna Singer and Al Dickson are plaintiffs below and plaintiffs in the action before the Navajo tribal court.

Respondents

Respondents San Juan Health Services District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway (official capacity only), John Lewis and Lauren Schafer (collectively "respondents or Health District respondents") are defendants below and defendants in the action before the Navajo tribal court. Petitioners purport to substitute as defendants (albeit in their official capacities) several newly appointed members of the Health District Board of Trustees, including Nettie Prack, Grant Imel and Cleal Bradford. However, because these Health District officials are sued only in their official capacity, and official capacity suits are indistinguishable from a suit against the governmental entity, substitution of these parties is unnecessary. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Turner v. Houma Municipal Fire and Police Civil Service Board*, 229 F.3d 478, 483 (5th Cir. 2000).

Additional Parties in this Court

San Juan County, J. Tyron Lewis, Lyn Stevens (official capacity), Manuel Morgan (official capacity), Bill Redd, Rick Bailey, Craig Halls (collectively "San Juan County respondents"), Truck Insurance Exchange ("Truck Insurance") and Dennis Ickes are additional respondents, defendants below, and defendants in the action before the Navajo tribal court.

PARTIES TO THE PROCEEDINGS – Continued

Additional Parties Below

Dr. Steven MacArthur, Michele Lyman, Helen Valdez, Candace Laws, Paul Kieth, Dorothy Kieth, Baxter Benally, Percy Mitchell, Melvin Capitan, Candace Holiday, Percy Mitchell, Eva Pleasant, Amy Terlaak and Linda Cacapardo were additional plaintiffs in the district court below, but were not parties in the action before the Navajo tribal court.

Cleal Bradford, John Housekeeper, Gary Holliday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito and Julie Bronson were additional defendants in the district court below, but were not parties in the action before the Navajo tribal court.

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The December 28, 1999 preliminary injunction entered by the District Court of the Navajo Nation, Judicial District of Shiprock, New Mexico, is reprinted in the appendix to the petition for writs of mandamus and prohibition ("P. App. [02-1774]") at 1a-32a. The Navajo tribal court entered three additional orders in furtherance of the December 28, 1999 preliminary injunction. These orders, dated March 1, 2000, March 2, 2000 and March 15, 2000, are reprinted in P. App. [02-1774] at 33a-57a. In the action below, petitioners sought enforcement of these orders entered by the Navajo tribal court.

The October 30, 2000 decision of the United States District Court for the District of Utah, Central Division, is unreported and is reprinted in P. App. [02-1774] at 169a-194a. The October 30, 2000 order dismissed petitioner's claim seeking enforcement of the tribal court orders with respect to the Health District and San Juan County respondents. The December 12, 2000 decision of the District Court is unreported and is reprinted in P. App. [02-1774] at 195a-211a. The December 12, 2000 order dismissed the claim seeking enforcement of the tribal court orders with respect to respondents Dennis Ickes and Truck Insurance.

The October 7, 2002 decision of the United States Court of Appeals for the Tenth Circuit is reported at 309 F.3d 1216, and is reprinted in P. App. [02-1774] at 121a-144a. On November 8, 2002, the court of appeals denied a petition for panel rehearing submitted by petitioners as well as a petition for rehearing en banc submitted by respondents. The Order denying the petitions is reprinted

in the appendix to the petition for writ of certiorari previously filed by petitioners ("P. App. [02-1253]") at 105a-106a. Petitioners also filed a petition for writ of mandamus in the court of appeals, asking the court to vacate and replace its October 7, 2002 decision and direct the district court to either recuse itself or follow different directions than those given in the October 7, 2002 decision. The court of appeals denied the petition for writ of mandamus. P. App. [02-1774] at 119a.

BASIS FOR JURISDICTION

This Court's jurisdiction to hear petitions for extraordinary relief is based on 28 U.S.C. § 1651(a) and Rule 20.1 of the Rules of the Supreme Court. In reliance on Rule 20.3, this Brief in Opposition to the petition for writs of mandamus and prohibition is filed within thirty days from June 5, 2003, the date on which the petition was placed on the docket.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, REGULATIONS AND ORDINANCES

The constitutional provisions, treaties, statutes, or other authorities identified by petitioners are not relevant to determination of whether a writ of mandamus or prohibition should issue. Rule 20 is relevant to the petition but is not reprinted here. The All Writs Act, 28 U.S.C. § 1651(a), is also relevant and provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their

respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The Health District is a special service district organized by respondent San Juan County pursuant to Utah Code Ann. § 17A-2-1204. The individual Health District respondents are employees of the Health District or members of its board of trustees. The individual San Juan County respondents are County officials or employees of San Juan County.

The Health District operates a hospital in Monticello, Utah, as well as several outpatient clinics. Prior to January 1, 2000, the Health District operated an outpatient clinic located in Montezuma Creek, Utah. The Montezuma Creek Clinic is located within the exterior boundary of the Navajo Reservation on fee land owned by the State of Utah as part of the Utah Navajo Trust Fund.[1] P. App. [02-1253] at 3a. The Health District provided medical services at the Clinic to Native Americans residing on the Navajo reservation pursuant to a contract with Indian Health Services, a federal government agency. Petitioners Fred Riggs, Donna Singer and Al Dickson were employed by the Health District at its Montezuma Creek Clinic. *Id.* In

[1] Petitioners state that the Clinic is on "Navajo Nation trust land," implying ownership of the land by the Navajo tribe. Petition at 16, n.31. In fact, the land on which the Clinic is located is owned by the State of Utah as part of the Utah Navajo Trust Fund, which the State of Utah administers. That the Trust Fund proceeds are used for the benefit of the Navajo people does not change the nature of that ownership.

approximately November 1998, the Health District terminated Singer's employment, while Riggs and Dickson remained employed by the Health District at the Montezuma Creek Clinic until January 1, 2000, when the Health District ceased operating the clinic.[2]

In April 1999, petitioners filed a Complaint for Damages in the Navajo tribal court. P. App. [02-1253] at 3a. While petitioners describe their tribal court Complaint as asserting Navajo law violations, Petition at 5, the Complaint in fact asserted a broad array of claims against the Health District and San Juan County respondents, including federal civil rights claims, state law tort claims and some Navajo law claims. P. App. [02-1253] at 4a, n.2. Riggs' and Dickson's claims arose generally out of their employment relationship with the Health District, while Singer's claims arose primarily from the Health District's termination of her employment.

Respondents asserted both sovereign immunity and lack of jurisdiction as defenses to the Navajo tribal court Complaint. P. App. [02-1253] at 30a. Nevertheless, on December 28, 1999, the Navajo tribal court issued a preliminary injunction in which it ordered the Health District to reinstate petitioner Singer to her previous position and awarded back pay and attorneys fees (an amount petitioners claimed was in excess of $500,000) to each of the petitioners. P. App. [02-1774] at 1a-32a.

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[2] Since January 1, 2000, the Montezuma Creek Clinic has been owned and operated by Utah Navajo Health Systems, Inc. ("UNHS"), an entity of which Singer is the executive director. Singer, Riggs and Dickson have all been employed by UNHS at the Montezuma Creek Clinic since January 1, 2000.

Despite the fact that the Health District owned and operated the Montezuma Creek Clinic, the preliminary injunction order also purported to preclude respondents from "interfering" with the management of the Clinic and directed respondents to take certain affirmative steps with respect to its operation of the Health District. *Id.* at 29a-37a. Moreover, although petitioners were the only named parties, the order provided broad relief to members of the Navajo Tribe in general, including prohibiting the Health District from billing Navajo Tribe members for health care services, regardless of whether the services were provided at the Montezuma Creek Clinic or at Health District facilities off the reservation. *Id.* at 31a.[3]

In March 2000, the tribal court entered several orders supplementing the preliminary injunction, including an Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order dated March 1, 2000, P. App. [02-1774] at 33a; the Special Order in Aid to Satisfaction of Preliminary Injunction dated March 2, 2000, *Id.* at 53a; and the Order Mandating that All Defendants' [sic] Be Bound by the Preliminary Injunction Order. *Id.* at 55a. Pursuant to these orders, the Navajo tribal court ordered respondents immediately to pay back wages and attorneys fees, *id.* at 48a-49a; imposed a $10,000 per day penalty upon respondents in the event they failed to comply

[3] Petitioners' assertion that the tribal court's preliminary injunction order became the judgment on the merits with respect to the claims addressed by the orders is misleading. Petition at 9. While the orders suggest that the preliminary injunction evidence provided by petitioners established part of their case in chief, the tribal court clearly contemplated further proceedings on petitioners' claims. P. App. [02-1774] at 41a-43a.

immediately with the Navajo tribal court's orders, $1,000 of which was to be paid by the individual respondents, *Id.* at 51a-52a; and ordered that the penalty would apply during any period of appeal.[4] *Id.* The tribal court also purported to grant petitioners leave to seek immediate enforcement of its orders in any Utah or federal court. *Id.* at 54a. Finally, the Navajo tribal court permitted petitioners to add as defendants Truck Insurance, the Health District's insurer, and Dennis Ickes, counsel for the Health District and San Juan County respondents in Navajo tribal court. The tribal court also bound both newly added defendants to its previously-entered orders. *Id.* at 55a-57a.[5]

In August 2000, petitioners filed this action in the United States District Court for the District of Utah seeking to enforce the tribal court orders.[6] Shortly after the institution of this action, respondents moved to

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[4] Petitioners state that an April 2003 "clarification" from the tribal court demonstrates that these fines are not "penal" in nature. The nature of the fines should be judged on the language of the order, not a self-serving "clarification" prepared and submitted by petitioners three years after the fact, particularly where petitioners did not serve respondents with the clarification until after the tribal court executed it.

[5] Petitioners assert that in the tribal court, respondents were given every opportunity to respond to petitioners' claims, and were afforded due process. Petition at 5-6. The Health District defendants dispute this assertion.

[6] In addition to the enforcement claim asserted by petitioners, the district court action named as plaintiffs a number of individuals other than petitioners. These additional plaintiffs asserted a broad range of federal civil rights and other claims against respondents as well as other defendants. The claims of these additional plaintiffs are not at issue before the Court.

dismiss petitioners' claims to enforce the Navajo tribal court orders based on respondents' sovereign immunity from suit in tribal court. By Order dated October 30, 2000, the district court dismissed petitioners' enforcement claim with respect to the Health District and San Juan County respondents. *Id.* at 169a. The district court held that, as political subdivisions of the State of Utah and their officials or employees, the Health District and San Juan County respondents shared in the State's sovereign immunity from suit in the Navajo tribal court. *Id.* at 184a. On December 13, 2000, the district court entered an order dismissing the enforcement claim as against Truck Insurance and Ickes on the grounds the tribal court lacked subject matter jurisdiction over them. *Id.* at 195a.

Thereafter, petitioners sought and obtained certification of the October 30 and December 13, 2000 orders pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. On appeal, the court of appeals reversed the district court's ruling with respect to the Health District and San Juan County respondents. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); P. App. [02-1774] at 121a. While the court of appeals acknowledged that cross-petitioners may have been entitled to sovereign immunity from suit in the Navajo tribal court, it found that the district court should have addressed the issue of the tribal court's subject matter jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), prior to addressing cross-petitioners' claim of sovereign immunity. *Id.* at 1226; P. App. [02-1774] at 140a. The court of appeals remanded petitioners' claim against the Health District and San Juan County respondents to district court for a determination of the tribal court's subject matter jurisdiction. *Id.* at 1228; P. App. [02-1774] at 141a. The court of

appeals affirmed the district court's dismissal of petitioners' claim against Truck Insurance and Ickes, concluding that the Navajo tribal court lacked jurisdiction pursuant to *Montana*. *Id.* at 1223-24; P. App. [02-1774] at 136a-137a.

Petitioners filed a petition for panel rehearing of the court of appeals' decision, which was denied. Petitioners also filed a petition for writ of mandamus with the court of appeals, asking the court of appeals to order the district court to disregard the appellate court's remand instructions, and instead, to enforce the orders immediately. The court of appeals denied the petition, finding (i) it was in essence an untimely petition for rehearing, and (ii) petitioners had another adequate avenue of relief because they could appeal any adverse decision by the district court on remand.

Petitioners filed a petition for writ of certiorari in this Court in February 2003. Both the Health District and San Juan County respondents filed conditional cross-petitions for writs of certiorari. The petition for writ of certiorari and the cross-petitions were denied on June 2, 2003.

REASONS FOR DENYING THE PETITION

The petition for writs of mandamus and prohibition[7] must be denied because petitioners cannot demonstrate

[7] Mandamus and prohibition are both types of extraordinary writs that may be invoked to correct an unlawful assumption of jurisdiction by a lower court. The main difference is that a writ of mandamus is an affirmative remedy – it compels a court or other entity or person to do

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that they meet the requirements of Rule 20.1, which provides:

> Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Traditionally, the extraordinary writs have been used only to confine an inferior court to act within its jurisdiction or to compel it to exercise its jurisdiction according to its duty to do so. *Mallard v. United States District Court*, 490 U.S. 296, 308 (1989); *Will v. United States*, 389 U.S. 90, 95 (1967). Only exceptional circumstances amounting to a usurpation of judicial power will justify issuance of an extraordinary writ. *Id.* at 309; *Will*, 389 U.S. at 95. The petitioning party must also show that its right to the issuance of the writ is clear and indisputable. *Will*, 389 U.S. at 96. The petition must be denied because petitioners fail to satisfy any of the prerequisites to issuance of an extraordinary writ.

The petition also should be denied because petitioners have not identified the name and office or function of the persons against whom they seek relief, as required by Rule 20.3 of the Rules of the Supreme Court.

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something. A writ of prohibition is a negative remedy – it commands that something be left undone. 63C AM. JUR. 2D PROHIBITION § 6.

I. THE PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE REQUIREMENTS OF RULE 20.1.

As noted above, prior to filing this petition, petitioners filed a petition for writ for certiorari, claiming error and seeking review of the court of appeals' decision. Apparently anticipating this Court's June 2, 2003 denial of the petition for writ of certiorari, on May 28, 2003, petitioners filed the petition for writs of mandamus and prohibition. This petition seeks the same relief and makes essentially the same arguments contained in the petition for writ of certiorari. In requesting certiorari, petitioners argued that the court of appeals erred in remanding for a subject matter jurisdiction analysis (followed by a sovereign immunity analysis if necessary). Instead, petitioners argued, the court of appeals should have found that the tribal court had subject matter jurisdiction and enforced the tribal court orders under principles of full faith and credit. Petition for Writ of Certiorari in No. 02-1253 at 19, 24-26.

In this petition, petitioners once again argue that the court of appeals erred and that the tribal court orders should be given full faith and credit and enforced because the tribal court had jurisdiction or authority over the non-Indian defendants for actions arising on the reservation, albeit on non-Indian owned land. In asserting that the tribal court had authority over the non-Indian defendants, petitioners make exactly the same arguments they made in the petition for writ of certiorari. For example, in both petitions, petitioners argue that the tribal court's authority is supported by, among other authorities, 25 U.S.C. §§ 450, 1301, 1302, 3601, 3602, 3651, Executive Order

13175, the BIA Navajo Judicial program contract, Senate Report No. 88, 103rd Cong., 1st Sess. 8 (1993); and the United Nations International Covenant on Civil and Political Rights. *Compare* Petition [02-1253] at 12-25 *with* Petition [02-1774] at 14-19. Petitioner's second attempt to obtain appellate review from this Court does not satisfy the requirements of Rule 20.1 and must be denied.

A. The Petition Is Not in Aid of This Court's Jurisdiction

As an initial matter, the petition must be denied because it is not in aid of this Court's jurisdiction. Although entitled "Petition for Writ[s] of Mandamus and Prohibition," the petition seeks the same relief as the petition for writ of certiorari – appellate review and reversal of the court of appeals' allegedly erroneous decision. The issuance of a writ is not proper in these circumstances. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (stating that a writ of mandamus is not appropriate to address a simple showing of error); *see also State ex rel. Lambert v. King*, 538 S.E.2d 385, 388 (W.V. Ct. App. 2000) ("it is well established that a 'writ of prohibition will not issue to prevent a simple abuse of discretion by the trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.'" (citation omitted)). The petition is a thinly veiled attempt to circumvent this Court's previous denial of appellate review in connection with the petition for writ of certiorari. Granting the petition would therefore frustrate, not aid, this Court's jurisdiction.

B. Petitioners Cannot Establish the Exceptional Circumstances Necessary to Allow Issuance of a Writ of Mandamus

As stated above, a writ of mandamus is appropriately issued only where a court has failed to act when it is its duty to do so, or to prevent a court from acting outside its jurisdiction. *Allied Chemical,* 449 U.S. at 35. Here, petitioners argue that the court of appeals erred by not enforcing the tribal court orders, and they seek mandamus because their attempt to obtain appellate review by way of a petition for writ of certiorari failed. Claims of legal error, as opposed to lack of jurisdiction, do not supply the type of exceptional circumstances necessary for issuance of a writ of mandamus. *Id.* Granting the petition for a writ of mandamus in this situation would create a "backdoor" appellate procedure for litigants who unsuccessfully seek review from this Court by way of a writ of certiorari. The petition should therefore be denied.

C. Petitioners Have Other Adequate Avenues For Relief

Rule 20.1 also requires that a party seeking issuance of an extraordinary writ have no other adequate means to attain the relief he desires. *See also Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943). Here, petitioners had an adequate means to seek review of the court of appeals' decision – a petition for writ of certiorari. That the petition for writ of certiorari was unsuccessful does not provide a basis for granting a writ of mandamus.

In fact, petitioners have avenues for relief in addition to the petition for certiorari. Petitioners can and have sought rehearing of the denial of their petition for writ of

certiorari. Petitioners also have recourse in district court. Pursuant to the court of appeals' mandate, the issue of subject matter jurisdiction has now been briefed and argued to the district court, and the parties are awaiting a decision. If petitioners are unhappy with the district court's decision, they can appeal that decision. *See* Order Denying Petition for Mandamus dated Feb. 20, 2003 (10th Cir.), P. App. [02-1774] at 119a (indicating that petitioners' ability to appeal any adverse judgment by the district court constitutes "other adequate means" to attain the relief they desire). Petitioners' many alternate avenues for relief require that the petition be denied.

D. The Petition for Writ of Mandamus Must Be Denied Because the Tribal Court Orders Are Not Entitled to Full Faith and Credit

Even if petitioners had satisfied Rule 20.1, their petition for writ of mandamus fails on the merits. Petitioners' argument that the tribal court orders must be given full faith and credit and enforced because the tribal court had authority over the respondents' actions is unavailing. The Full Faith and Credit Clause provides that each state shall give "full faith and credit" to another state's public acts, records and judicial proceedings. U.S. Const. art. IV, § 1. Congress has implemented the Full Faith and Credit Clause at 28 U.S.C. § 1738, which provides that authenticated judicial proceedings of any state, territory or possession of the United States shall be given the same effect in every court within the United States and its states, territories or possessions that the proceedings had in the jurisdiction in which they were issued. The

tribal court's orders do not fall within this statute and are not entitled to full faith and credit in federal court.

Tribes are not considered territories or possessions of the United States for purposes of the Full Faith and Credit Clause, and tribal court proceedings are therefore not entitled to full faith and credit in federal court. *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (holding that tribal court judgment is not entitled to full faith and credit and tribe is not a territory within the meaning of full faith and credit clause).[8] While petitions cite *Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887 (2003), for the proposition that Indian nations are treated like states and territories for purposes of 28 U.S.C. § 1738, *Inyo* does not support that argument. In *Inyo*, this Court concluded that a tribe, as a sovereign, is not a "person" entitled to bring suit under 42 U.S.C. § 1983. *Id.* at 1894. Contrary to petitioners' assertion, petition at 17, the Court did not state that a tribe is a state or territory for purposes of § 1983, but only noted in passing that, like states, tribes could not sue under § 1983 by reason of their sovereignty. *Id.* at 1892. *Inyo* simply does not support petitioners' claim that tribal court orders are entitled to full faith and credit in the federal courts.[9] Petitioners have failed to

[8] In *United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103-04 (1855), the Court held that the Cherokee nation was a territory but only as that term was used in a federal letters of administration statute.

[9] Petitioners also rely on *Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088 (N.M. App. 1997) in support of their argument that the tribal court orders should be enforced as a matter of full faith and credit. However, that New Mexico has decided to afford tribal court orders full faith and credit in its own courts does not establish such orders are

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demonstrate that the tribal court orders are entitled to full faith and credit.

II. THE PETITION FOR WRIT OF PROHIBITION MUST BE DENIED

A. A Writ of Prohibition Is Not the Appropriate Remedy

Although a writ of prohibition is similar to a writ of mandamus, a writ of prohibition commands that an act be left undone, while a writ of mandamus compels action. *See supra* n.7. Because a writ of prohibition is a negative remedy, it is not an appropriate remedy for acts that have already occurred. 63C AM. JUR. 2D PROHIBITION § 4. Here, petitioners seek the writ to correct the district court's alleged error in allowing the Health District and the individual Health District respondents to be represented by one law firm.[10] The remedy petitioners seek is affirmative, not negative. Their petition for a writ of prohibition must therefore be denied.

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given full faith and credit by federal courts. Moreover, *Halwood* states that New Mexico accords tribal court proceedings full faith and credit only if the tribal court had subject matter jurisdiction over the defendants. Here, neither the district court nor the court of appeals has ruled on the issue of subject matter jurisdiction, nor has it been briefed by respondents in this Court.

[10] The Petition implies that both the County and Health District respondents are represented by one law firm. In fact, as the pleadings in this action demonstrate, the County respondents and the Health District respondents are represented by separate counsel.

B. The Petition for a Writ of Prohibition Does Not Meet Rule 20.1's Requirements

Whether seeking a petition for writ of prohibition or mandamus, petitioners must demonstrate that the requirements of Rule 20.1 have been met. Petitioners cannot do so. First, petitioners cannot show that the writ they seek would further the jurisdiction of this Court. As set forth *infra* Section II.C, contrary to petitioners' arguments, respondents' representation arrangements are appropriate under the ethical rules. In addition, as with the requested writ of mandamus, petitioners inappropriately seek to correct alleged lower court error by a writ of prohibition, rather than pursuing their right to appeal. Thus, it would not further this Court's jurisdiction to issue an extraordinary writ.

Nor can petitioners demonstrate that exceptional circumstances justify the issuance of a writ. Petitioners' allegation that respondents' representation is inappropriate is based on speculation, assumption and outdated or inapplicable legal authority. *See infra* Section II.C. Petitioners must demonstrate that their right to the writ is clear and indisputable. Speculation and assumption do not meet this burden or create exceptional circumstances.

Finally, petitioners have another avenue for relief. If petitioners truly believe they have evidence of improper representation, petitioners can once again seek relief in the district court. Petitioners may also raise the issue on appeal, when district court proceedings conclude. As the Ohio Supreme Court has noted, "[p]rohibition will not lie to prevent an anticipated erroneous judgment." *State ex rel. Jones v. Suster*, 701 N.E.2d 1002, 1006 (Ohio 1998). Thus, the petition for writ of prohibition must be denied.

C. The Petition For Writ of Prohibition Lacks Substantive Merit

Even if petitioners could meet the requirements of Rule 20.1, which they cannot, their request for a writ of prohibition lacks substantive merit. Contrary to petitioners' arguments, the Health District respondents' representation is contemplated by and allowed under the Utah Rules of Professional Conduct. *See* Utah R. Prof. Cond. 1.7; 1.13. Rule 1.7 provides a procedure for dealing with potential conflicts, i.e., providing notice to the clients of the potential for conflicts and allowing the clients to waive those conflicts if and when they arise. *See* Rule 1.7(b). While petitioners assert that a conflict exists, they fail to point to any facts, as opposed to speculation and assumption, demonstrating a conflict. None of the individual Health District respondents have alleged liability on the part of or directed blame toward other respondents. Mere unsupported speculation does not provide a basis for relief.

The authorities on which petitioners rely in seeking the writ of prohibition are equally flawed. Petitioners argue that respondents' representation improperly precludes petitioners, and presumably their counsel on their behalf, from petitioning their elected representatives contrary to Utah State Bar Ethics Opinion 115. Petitioners' reliance on Opinion 115 is misplaced because it has been superceded by significant amendments to Rule 4.2. The amended version of Rule 4.2 prohibits much of the contact between a lawyer and represented governmental officials that was deemed acceptable in Opinion 115, based on the pre-amendment version of Rule 4.2. Moreover, the ability of petitioners and their counsel to communicate with the government officials and employees named as

parties in this action is governed by the ethical rules, not by respondents' choice of representation.

Petitioners also rely on Utah Ethics Opinion 98-06 and *Salt Lake County Comm'n v. Short*, 985 P.2d 899 (Utah 2000). However, both Opinion 98-06 and *Short* deal with the ethical obligations of a government attorney such as a district attorney. In this case, by contrast, private counsel has been retained by a special service district to represent it in connection with a particular matter. Petitioners have failed to demonstrate that the Health District's legal representation is wrongful in any way. The writ should be denied.

III. PETITIONERS' REQUEST FOR EXTRAORDINARY WRITS SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO COMPLY WITH RULE 20.3

Rule 20.3 provides that a petition seeking a writ of mandamus or writ of prohibition must state the name and office or function of every person against whom relief is sought. Petitioners have failed to meet this requirement for extraordinary relief. It is simply unclear from the petition against whom petitioners seek relief. Their petition should therefore be denied.

IV. RESPONDENTS SHOULD BE AWARDED DAMAGES AND COSTS PURSUANT TO RULE 42.2.

The Health District respondents hereby request and move the Court for an award of damages and costs pursuant to Rule 42.2 of the Rules of the Supreme Court, which allows for such awards when a petition for a writ of

certiorari, an appeal, or an application for other relief is frivolous. As noted above, the petition for writ of mandamus simply repeats the arguments made in petitioners' earlier filed petition for writ of certiorari – the tribal court had jurisdiction or authority to hear petitioners' claims against the respondents, and the lower courts should therefore have given the tribal court's orders full faith and credit and enforced them. This Court denied the petition for certiorari, and petitioners' attempt to circumvent that denial by filing a meritless petition for writs of mandamus and prohibition is frivolous and has caused respondents to incur significant costs. The costs were multiplied when petitioners sought to expedite consideration of the petition for writ of mandamus. Petitioners' actions are consistent with their prior conduct in this case, which includes filing numerous repetitive motions on the same subject, moving to recuse two federal district judges based solely on adverse rulings and filing motions challenging anticipated decisions without waiting for the actual decision.[11] *See, e.g.*, Order dated March 6, 2001, Case No. 2:00CV584K (D. Utah) (instructing petitioners to "refrain from filing additional memoranda on issues already briefed, (2) refrain from re-drafting and re-filing motions and memoranda, (3) temper their use of hyperbole and inflammatory language, and (4) cautioning petitioners that violation of the foregoing request will result in order requiring permission from the court for all future filings). As damages

[11] The petition for writs of mandamus and prohibition is an example of this conduct. Petitioners filed this petition without waiting for the Court to issue its decision on the petition for writ of certiorari. Moreover, petitioners then filed a petition for rehearing on the petition for writ of certiorari notwithstanding this petition.

under Rule 42.2, respondents should be awarded their attorneys fees and expenses incurred in responding to the petition for writs of mandamus and prohibition and the motion to expedite.

CONCLUSION

As petitioners themselves acknowledge, this petition is an attempt to short-cut the litigation process and obtain a speedier resolution of this matter. Petition at 26. Petitioners fear an adverse result in the district court and do not want to suffer the "delay" of the normal appellate process in the event of an adverse decision. Petitioners therefore want this Court to address the ultimate issue in this case – enforcement of the tribal court orders – even though neither the district court nor the court of appeals has yet decided the issue of subject matter jurisdiction, or whether, even if the tribal court had subject matter jurisdiction, respondents were afforded due process in the tribal court. Petitioners should not be allowed to avoid ordinary procedural and appellate processes. *See Will*, 389 U.S. at 97 (stating that mandamus is not a substitute for appeal); *see also Suster*, 701 N.E.2d at 1009 ("The fact that postjudgment appeal may be time-consuming and expensive to pursue does not render appeal inadequate so as to justify extraordinary relief." (citation omitted)).

For the reasons stated above, petitioners cannot establish a right to relief. The petition should be denied and the Health District respondents should be awarded their fees and costs incurred in responding to the petition.

Respectfully submitted,

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